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IN THE

Supreme Court of the United States

October Term, 1965
No. 856

BLAINE J. LORD, EDYTHE M. KERBER, et al.,
Petitioners,

versus

ROY T. HELMANDOLLAR, ETC., et al.,
Respondents.

On Writ of Certiorari to Court of Appeals
For the District of Columbia Circuit

PETITION FOR REHEARING

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BLAINE J. LORD, EDYTHE M. KERBER, et al.,
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versus

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Respondents

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PETITION FOR REHEARING

Petitioners present their petition for a rehearing of this Court's order dated February 28, 1966, denying the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, and, in support thereof, respectfully shows the following

Grounds for Rehearing

1. Court of Appeals Reading of the Language of the Law Mistakenly Treated as Finding of Trial Court.

This Court would have granted the Writ of Certiorari readily had it taken notice that the lower court's decision rested not on the finding of the United States District Court, in granting the petitioner's motion to vacate and re-enter the judgment, but solely and entirely on the lower court's reading of the language of the law, and on a finding of another district court.

In its opinion, the Court of Appeals for the District of Columbia says:

> Appellants rely on **Hill v. Hawes,** 320 U.S. 520 (1944) to support their contention that the time for appeal should be measured from the date on which the District Court granted their motion to vacate and re-enter judgment. In **Hill v. Hawes, supra,** the District Court vacated and re-entered its original judgment after the time for appeal had expired on the ground that the clerk of the court had failed to notify the plaintiff of the entry of the original judgment, as the clerk was, and still is, required to do by Rule 77(d), Fed. R. Civ. P. The Supreme Court, reversing this court, held that the District Court acted with its power * * * (Opinion p. 3-4, Appendix C)

The trial court vacated and re-entered its original judgment not on the ground which the Court of Appeals had in mind.

The trial court Order states:

> The plaintiffs' motion for order to vacate and re-enter judgment or order filed in the above-entitled cause having been given careful consideration, together with defendants' opposition thereto, also filed herein, it is by the Court, this 17th day of February, 1964,
>
> ORDERED, That the plaintiffs' motion for order to vacate and re-enter judgment or order be, and is hereby, granted. J. TAMM, JUDGE.
>
> (Joint Appendix, p. 81-2).

The plaintiffs' motion presented the trial court a number of reasons for granting the relief prayed for:

—that plaintiffs and their attorney failed to receive notice of entry of judgment and of the judgment;

—by reason of inadvertence and excusable neglect occasioned by unusual circumstances and

—by the confusing fact that their attorney actually concerned and who argued case had expected to be served with the judgment or notice of entry of judgment;

—that it shall be **in the interest of justice, under the circumstances.** (Joint Appendix, p. 75-76)

The affidavits filed in support thereof substantiated largely the unusual circumstances which would have sufficiently addressed themselves to the equitable jurisdiction of the trial court which "seeks justice rather than technicality, truth rather than evasion, common sense rather than quibbling," and which "will not suffer a wrong to be without a remedy." In all the proceedings in the District Court, the same judge presided.

It goes without saying that the trial court did not grant plaintiffs' motion to vacate and re-enter judgment on any particular ground, but **on the whole reasons and supporting matters presented to it and upon what the judge personally knew himself.**

Was the trial court competent to grant plaintiffs' motion? We contended in the court below that it was competent and referred ourselves to the language of this Court in **Hill v. Hawes,** supra, especially to the following passages:

"These rules do not in terms apply to the situation here present, as the court below held. **But we think it was competent for the trial judge,** in view that the petitioner relied upon the provisions of Rule 77(d) with respect

to notice, and, **in the exercise of a sound discretion, to vacate the former judgment and to re-enter a new judgment** of which notice was sent in compliance with the rules." (Boldface supplied)

Thusly, petitioners contended "that the time for appeal should be measured from the date on which the District granted their motion to vacate and re-enter judgment" since the trial court was competent in the exercise of a sound discretion, we feel. It was competent and has the inherent power, under its equitable jurisdiction, if not under any Rules, in the interest of justice, to vacate a former judgment and re-enter a new judgment, under such terms as are just and put justice into effect.

But, obviously, the court below overlooked to consider that fact. Its attention was narrowed to the idea "that the petitioner relied upon the provisions of Rule 77(d) wih respect to notice" as the petitioner in Hill v. Hawes case did in the district court in which that case was tried. With that idea fixed in the mind of the Court of Appeal for the District of Columbia, it overturned the ruling of the District Court and dismissed petitioners' appeal on matter of lack of jurisdiction.

It did so, without any showing at all that the trial court in granting the motion to vacate the judgmen and to re-enter a new judgment had abused its discretion. As this Court well know, the court below can not do just that.

A petition to vacate a judgment is addressed to the sound legal discretion of the trial court, and its determination will not be disturbed except for abuse of discretion, and this is particularly true in the instance where the judge passing on the petition has presided in the litigation in which the judgment was entered. (Parker v. Checker Taxi Co., Inc. (CA 7th, 1956), cert. den. (1957) 353 U.S. 922, 77 S Ct. 681).

If the trial court was competent in the exercise of its discretion to vacate the former judgment and to re-enter a new one, upon the facts and reasons before it, and no showing had been shown at all that it had abused its discretion, its act, not having been assailed, stands valid. Petitioners may appeal from the re-entered judgment—such judgment, the granting of summary judgment in favor of defendants and against plaintiffs, petitioners herein, being appealable under the law. Petitioner then duly filed a notice of appeal. If the said action of the trial court in effect unabled petitioners to pursue an appeal, a court seeking within its equitable power to do justice "ought to do justice completely, and not by halves."

2. Cynical Doctrine of Justice Unwittingly Sanctioned.

The Court of Appeals has applied a restrictive rule and taken up the matter of jurisdiction, when it had heard the parties mainly on the merits of the cause, which will likely to plague the courts of the United States, and to embarrass this Court. This Court has, by denying a writ of certiorari, unwittingly countenanced that a governmental decision, even if corrupt, is right. This situation came about from the following facts:

The complaint filed in the District Court, seeking review of the decision of the governmental agency and the Secretary of the Interior, alleged, as a material issue, that Hon. Stewart L. Udall, from the inception, has a personal and professional interest in the outcome of the case, attaching thereto exhibit, and that the administrative officers, from the Land Office, Phoenix, Arizona, to those of the administrative appeal officers, exercising quasi-judicial power, could not have exercised it independently and free of the influence of the manifest conflict of interest held by the

Secretary of the Interior. The issue is essential in the outcome of the review. It becomes more so, where the evidence on the other material issue, the matter of mineralization necessary to a valid mineral discovery, preponderates toward establishing valid mining claims in favor of the petitioners.

The issue was taken up in the trial court. Petitioners and the government argued it. The trial court inquired of the government counsel: what he would say about the allegation that the Secretary of the Interior was personally interested in the outcome of the case? The things he said were not borne out by the record; but his summing up is startlingly significant:

> "Furthermore, the evidence is overwhelming in support of the decision; and even if it were corrupt, it would still be right." (Joint Appendix, p. 72).

In the Court of Appeals, the issue came up and argued. It loomed important when the petitioners showed how the evidence in the whole case tended to establish mineralization sufficient for valid mining claims, and the Court wanted to know whether petitioners have evidence to support the allegations concerning the matter of the Secretary of the Interior's personal and professional interest. Petitioners assured the Court they have and an exhibit was attached to the complaint, and that the record contains matters we have referred to in "Appellants Point No. 3" in Appellants' Opening Brief.

The question on appellate jurisdiction was hardly touched upon.

Determination of a case on its merits is universally favored. The court below should have been more loathe to disturb the ruling of the District Court. It could have required

the appellees to show that the trial court had abused its discretion in granting the motion to vacate and re-enter the judgment, and, in the absence of any showing, deny the cross-appeal, as it should have done, and determine the case on its merits. The Court of Appeals itself could have exercised a sound legal discretion.

By doing so, the Court of Appeals could have done double service, rather than double disservice. It could have resolved the issue concerning the claimed personal and professional interest of the Secretary of the Interior in the outcome of the cause, upon the adequacy of evidence or the insufficiency of it. It could have then explained away any cloud over that officer. It could have repudiated the principle held by the Department of Justice

> that a decision "even if it were corrupt, it would still be right."

By taking the expedience, as it did in its decision, and retreating from facing the issues on the merits, when it could just as well be guided by the spirit and the equitable considerations behind **Harris Truck Lines, Inc. v. Cherry, Thompson v. Immigration & Naturalization Service, Wolfson v. Hankin,** and cases conformably decided by other Courts of Appeal, which we cited in the petition for writ of certiorari, it lends versisimilitude to the conflict of interest that the Secretary of Interior is alleged to have, and to the principle that a decision even if it were corrupt it would still be right.

The Court of Appeals could have burnished anew the shield of integrity of the courts. Lawyers all over the country, comparing the "showing of unique circumstances" in the present case and other elements present to fit the spirit of **Harris** and other cases above, could not help make speculative inferences, which may not be altogether flattering.

And to the public, erroneous it may be, be left the idea that a decision "even if it were corrupt, it would still be right," and the shadow of Secretary of the Interior Stewart L. Udall upon the shield.

Conclusion

The probability that the petitioners' appeal has been dismissed under misapprehension and in an unwise and unjudicious restricture is so great that it is respectfully urged that this petition for a rehearing be granted, and, that, upon further consideration, writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit.

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CERTIFICATE OF COUNSEL

I, JOSE DEL CASTILLO, Esq., counsel for the above named petitioners, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

Jose del Castillo

Counsel for Petitioners